Supreme Court, U.S.
FILED

001382 FEB 7 2001

OFFICE OF THE CLERK

No _____

In The
Supreme Court of the United States

FRED D. COOK, JR. and JANE A. COOK,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR SUMMARY REVERSAL

JANE A. COOK
Pro Se
P.O. Box 222
2728 Route 94 West
Washingtonville, N.Y. 10992
(845) 496-9472

QUESTION PRESENTED

Whether the International Business Machines Corporation ("IBM") Technology Products Mid-Hudson Valley Transition Program (TP MHVTP) payment received in settlement of tort or tort type claim(s), by an IBM TP MHVTP participant, having personal injuries and personal sickness, sustained during employment, is excluded income under section 104(a)(2) of the Internal Revenue Code as "damages received" *** "on account of personal injury or sickness". (26 U.S.C 104(a)(2)).

PARTIES TO THE PROCEEDING

The petitioners in this case are Fred D. Cook, Jr. and Jane A. Cook. Mr. Cook is a party to this case because the petitioners filed a joint tax return.

TABLE OF CONTENTS

	Page
OPINIONS	1
JURISDICTION	1
RULES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
Cases:	
Abrahamsen v. the United States, No. 96-787, 44 Fed. Cl. 260(1999)	4,5
Abrahamsen v. the United States, 2000 WL 1434500 (Fed. Cir.)	5,6,10
Commissioner v. Schleier, 515 U.S. 323(1995)	5,6,10
Hamm v. Commissioner, 74 T.C.M. (CCH) 279(1997)	7
Keel v. Commissioner, 73 T.C.M. (CCH) 3092(1997)	8
Pipitone v. United States, 180 F. 3d 859(7th Cir. (1999)	5,6,7,8
Social Security Board v. Nierotko, 327 U.S. 358, 44 S. Ct.	7
Rules and Regulations:	
Age Discrimination In Employment Act of 1967	9

Page

Civil Rights Act of 1964
Title VII 9
Internal Revenue Code (26 C.F.R.)
Section 104(a)(2) i,2,4
Treasury Reg. (26 C.F.R.)
Section 1.104(c) 2

PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR SUMMARY REVERSAL

Fred D. Cook, Jr. and Jane A. Cook, Pro Se, respectfully petition for writ of certiorari to review the judgement below and request for summary reversal.

OPINIONS AND ORDERS BELOW

The judgement of the United States Court of Appeals for the Federal Circuit was entered as a mandate November 22, 2000 (App. A, 1a).

The order of the Federal Circuit for denial of a petition for rehearing was filed on November 15, 2000 (App. A, 2a).

The opinion announcing the Federal Circuit's affirmation of the decision of the United States Court of Federal Claims that granted the government's motion for summary judgement, denying the Cooks' claim for a tax refund, was entered on October 02, 2000 (App. A, 3a-5a). The opinion is unpublished.

The opinion and order of Judge Hodges's in the United States Court of Federal Claims granting the government's motion for summary judgement, denying the Cooks' claim for a tax refund was entered on June 21, 1999 (App. B, 1b-6b). The opinion is unpublished.

JURISDICTIONAL STATEMENT

The date in which the United States Court of Appeals for the Federal Circuit decided the case

was October 02, 2000.

A timely petition for rehearing was denied by the United States Court of Appeals for the Federal Circuit on the following date: November 15, 2000, and a copy of the order denying rehearing appears in appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

FEDERAL RULES AND REGULATIONS INVOLVED

1. Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C.104(a) (1988 & Supp. V 1993), provides in relevant part:

> Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include-
>
> ****
>
> (2)the amount of any damages received (whether by suit or agreement and whether a lump sums or as periodic payments) on account of personal injuries or sickness;
>
> ****

2. Section 104-1(c) of the Treasury Regulations, 26 C.F.R. 1.104(c) provides:

Section 104(c) [of the Internal Revenue Code] excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term "damages received (whether by suit or agreement)" means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of prosecution.

STATEMENT OF THE CASE

In this case, the wife, in May of 93, received from International Business Machines ("IBM") as settlement of tort or tort type claims, her Technology Products Mid-Hudson Valley Transition Program (TP MHVTP) payment, as the sum of damages on account of personal injuries and personal sickness, in exchange for signing her personalized "General Release and Covenant Not To Sue" in lieu of prosecution of IBM. In addition, as part of that Covenant the wife was guaranteed certain IBM benefits, one of which was, before retirement age, she would not lose retirement benefits by participating in the voluntary ITO program, titled the TP MHVTP, offered at IBM East Fishkill, New York. This was guaranteed by her signing her "TP MHVTP Pre-Retirement Leave of Absence Agreement". The pertinent language of the Leave stated that in April '93 she would take a leave of absence

without pay and become an inactive employee. In addition, at the termination of her leave, at age 55, she would retire 11/30/98 and would not seek active employment and she would receive her first pension check for compensation for services on 12/01/98. The two agreements were signed on April 28, 1993.

Petitioners in 1996, became aware that based on the wife's employment history and her IBM medical records, her TP MHVTP payment qualified as excluded income under Internal Revenue Code section 104(a)(2).

Petitioners submitted a timely claim for taxes, in the amount of $10,674.98, wrongly withheld from the wife's damages, by IBM. Petitioners' claim was filed on 6/29/96 with the Internal Revenue Service ("IRS") and the refund was denied 9/03/96. Petitioners appealed to the IRS Appeals Office and the refund was denied 05/08/97.

Petitioners, independent of the Abrahamsen, case No. 96-787, filed a complaint with the U.S. Court of Federal Claims. Only after receiving notice of the decision of Abrahamsen v. United States, No. 96-787, 44 Fed. Cl. 260 (1999), did the trial court grant government's motion for summary judgement, denying the Cooks' refund 6/21/99.

Because the Cooks' case appeared to be similar to the Abrahamsen case, the Abrahamsen case was influential in the trial court's decision of the Cooks' case.

In the Abrahamsen case, 2,631 former

employees of International Business Machines Corporation ("IBM"), who participated in IBM's Individual Transition Option ("ITO") programs brought a suit claiming refund of Federal Income and Federal Insurance Contribution Act ("FICA") taxes withheld from their ITO payments.

The trial court designated four test cases representative of one of IBM's ITO programs. See Abrahamsen, supra.

The Federal Circuit affirmed the decision of the trial court that the program payments in the four test cases were not received on account of personal injuries or sickness and therefore, subject to taxes. See Abrahamsen v. United States, 2000 WL 1434500 (Fed. Cir.)

Only after affirmation of the decision of the trial court of the Abrahamsen four IBM test cases, did the Federal Circuit view Petitioners' case and affirmed the decision of the trial court granting the government's motion for summary judgement denying the Cooks' claim for refund 10/02/2000. Cooks petitioned for rehearing and were denied, 11/15/2000.

REASONS FOR GRANTING THE PETITION

The Federal Circuit has decided an important and recurring issue of tax law in a way that directly conflicts with applicable decision of this Court, of Commissioner v. Schleier, 515 U.S. 323 (1995) and with the reasoning of the 7th Circuit of Pipitone v. United States, 180 F. 3d 859 (7th Cir. 1999). The Federal Circuit ignores the plain

language of the personalized "General Release and Covenant Not to Sue" (App. D, 1d-7d) and of the generic version of the "General Release and Covenant Not to Sue" (App. E, 1e-8e).

The Federal Circuit's erroneous decision was arrived at by taking an unrelated issue of fact and inaccurately representing it to support its decision by stating:

"The payment Ms Cook received was based solely on her salary and length of service with IBM"

The statement inaccurately continues and states what the intent and design of the TP MHVTP payment was:

> "[The payment] was not designed to compensate for her specific injuries. See Abrahamsen, slip op. at 5-6. Thus the amount she received was "completely independent of the existence or extent of any personal injury." Schleier, 515 U.S. at 330. Under these circumstances, section 104(a)(2) does not operate to exclude the payment from income. See id. at 330-31. We therefore affirm the decision of court of Federal Claims." (App., 4a-5a)

The circumstances, as stated by the Federal Circuit, are not accurate nor representative of the facts of record of Petitioners' case.

1. The wife's full length of service of 23 years was not used to calculate her payment, but instead, her 17.5 years of active service. A

period of time that she was in an IBM environment, in which IBM could be held liable for any alleged claims filed against IBM. However, per the courts, such claims do not have to be formerly or assertively filed "to establish the existence of an underlaying tort type cause of action". Pipitone v. United States,1999 WL 384164, *4 (7th Cir. (Ill.)); Hamm v. Commissioner, [Dec. 52, 189] 74 T.C.M., CCH 358, 282 (1997).

Tort and tort type claims of the wife have been acknowledged to exist by the Federal Circuit (App. A, 5a).

During the inactive employment period of the wife's leave, she maintained an "employer-employee relationship" Social Security Board v. Nierotko, 327 U.S. 358, 66 S. Ct. at 637[8], bringing her total years of service to 23. This 5 year period of her employment was not part of the formula, because during her inactive employment, she was not in an IBM environment, thus, IBM would have no liability.

As the wife's active employment years, the years in which IBM could have liability, were used to calculate the sum of her payment, indicated that damages were one of the intents of the TP MHVTP payment.

2. In the generic form of the Covenant. End note 1 (App. E, 7e), pertaining to the California Civil Code 1542, supports Petitioners' claim that one of the intents and design of the payment was for damages. The only part of the settlement that

could be "materially" affected was the amount of the TP MHVTP payment. Although this paragraph is specifically for California participants, it clearly reflects that one of the intents and design of the payment was damages for settlement of tort or tort type claims.

3. The Federal Circuit acknowledged that the wife had bona fide tort or tort type claims of which IBM had knowledge, but the court still opined that the wife's payment was not an amount received for damages on account of personal injuries and sickness. This contradicts the reasoning of the 7th Circuit, "However, 'the absence of any knowledge of the claim on the part of the employer-payor obviously has a negative impact in determining the requisite intent of the payment.'" Pipitone v. United States, supra; citing Keel v. Commissioner,73 T.C.M. (CCH) 3092, 3095 (1999).

As IBM had knowledge of the wife's tort or tort type claims as well as her personal injuries and sickness, obviously has a positive impact in determining the requisite intent of the payment, which was as an amount for damages on account of personal injuries and sickness.

4. The Federal Circuit weighs heavily against the payment being an amount for damages on account of personal injury and sickness, because of IBM's non-conventional formula for uniformly determining settlement payments without

negotiations, and therefore, decided that the amount was completely independent of the existence or extent of any personal injuries.

The participant had an option to take IBM's offered payment or not take the offered amount and negotiate. Refusal of the offer would have no effect on the participant's eligibility for receiving program benefits offered by the TP MHVTP, which were designed "to assist employees who choose to participate in the program making the transition into a new career or retirement." These program benefits were the opportunity to participate in the services of the Career Transition Center ("CTC") and The Retraining Assistance Program (RAP).

5. According to the wife's Covenant (App. D, 2d-3d), IBM intended the payment as a settlement for three types of claims: (a) claims arising from the Age Discrimination in Employment Act of 1967; (b) claims arising from Title VII of the Civil Rights Act of 1964; and (c) claims based on theories of contract or tort whether based on common law or otherwise.

What determined whether the TP MHVTP payment was a sum for damages on account of personal injury and sickness was the circumstances surrounding the employment and medical history of the TP MHVTP participant whose name appears in the personalized version of the Covenant.

The only known claims in the wife's IBM active employment history were tort or tort type

claims. Clearly all of the wife's payment was a sum for damages on account of personal injuries and sickness that had accrued at the time of her signing her "General Release and Covenant Not to Sue" in lieu of prosecution of IBM.

In the Abrahamsen case, the four taxpayers of the test cases denied having experienced any personal injury or sickness during their IBM employment and IBM had no knowledge of any claims filed against it by the taxpayers at the time of execution of their Covenants. This was significantly different from the fact of record of Petitioners' case.

Unlike plaintiffs in Abrahamsen, the wife's payment meets the two independent requirements set forth of this Court's decision of Commissioner v. Schleier, supra, 337.

Firstly, the Federal Circuit acknowledged there existed an underlying cause of action giving rise to recovery based on tort or tort type rights and secondly, the language of the two Covenants, the personalized and the generic, indicated that one of the intents and design of the payment was damages, and because of the circumstances surrounding the wife's employment record and IBM medical records, her TP MHVTP payment was damages received on account of her personal injuries and sickness.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for certiorari should

be granted.

Jane A. Cook
Pro Se
P. O. Box 222
2728 Route 94 West
Washingtonville,
New York 10992-0222
(845) 496-9472

February 2001

APPENDIX A

United States Court of Appeals for the Federal Circuit

99-5131

FRED D. COOK, JR.,
Plaintiff-Appellant,

and

JANE A. COOK,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Judgement

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

IN CASE No(s). 97-CV-829

This CAUSE having been heard and considered, it is considered, it is

ORDERED and ADJUDGED: **AFFIRMED**

ENTERED BY ORDER OF THE COURT

DATED OCT. 02 2000 S/Jan Horbaly
Jan Horbaly, Clerk

APPENDIX A

ISSUED AS A MANDATE: November 22, 2000

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

O R D E R

Before PLAGER, Circuit Judge, RADER, Circuit Judge, and SCHALL, Circuit Judge.

A petition for rehearing having been filed by the APPELLANTS,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same is, DENIED.

The mandate of the court will issue on November 22, 2000.

FOR THE COURT,
s/Jan Horbaly
Jan Horbaly, Clerk

Dated: November 15, 2000

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
NOV 15,2000
Jan Horbaly
Clerk

cc: Fred D. Cook, Jr.
Jane A. Cook
Donald B. Tobin

APPENDIX A

COOK V US, 99-5131
(CFC - 97-CV-829)

****
* Note: Pursuant to Fed. Cir. R. 47.6 this order*
* is not citable as precedent. It is a public *
* record. This disposition will appear in tables *
* published periodically. *
****

NOTE: Pursuant to Fed. Cir. R. 47.6. this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

99-5131

FRED D. COOK, JR.,
Plaintiff-Appellant,

and

JANE A. COOK,
Plaintiff-Appellant,

v.

APPENDIX A

UNITED STATES,
Defendant-Appellee.

DECIDED: October 2, 2000

Before PLAGER, RADER, and SCHALL, Circuit Judges.

PER CURIAM.

DECISION

Fred D. Cook, Jr. and Jane a Cook appeal from the decision of the United States Court of Federal Claims that granted the government's motion for summary judgment, denying the Cooks' claim for a tax refund. See Cook v. United States, No. 97-829T (Fed. Cl. June 21, 1999). Specifically, the court determined that the lump-sum payment Ms. Cook had received from her employer, International Business Machines Corporation ("IBM"), pursuant to an exit-incentive program was not excluded from income by 26 U.S.C. section 104(a)(2). See id., slip o.p. at 3-4. We affirm.

DISCUSSION

We recently held that the lump-sum payments received by four other former IBM employees pursuant to similar exit-incentive programs are

not excluded from income by 26 U.S.C. section 104(a)(2). See Abrahamsen v. United States, No. 99-5136 (Fed. Cir. September 28, 2000). The Cooks argue that Ms. Cook's lump-sum payment should be treated differently from the payments at issue in Abrahamsen because, unlike the test case employees in that case, she had suffered physical injuries and sickness which formed the basis of a bona fide tort or tort-type claim against IBM, and IBM was aware of her injuries. The existence of these injuries and IBM's knowledge of them, however, does not bring Ms. Cook's lump-sum payment under section 104(a)(2).

In order to be excluded from income by the statute, the payment must have been received "on account of personal injuries or sickness." See Comm'r v. Schleier, 515 U.S. 323, 330 (1995). The payment Ms. Cook received was based solely on her salary and length of service with IBM, and was not designed to compensate for her specific injuries. See Abrahamsen, slip op. at 5-6. Thus, the amount she received was "completely independent of the existence or extent of any personal injury." Schleier, 515 U.S. at 330. Under these circumstances, section 104(a)(2) does not operate to exclude the payment from income. See id. at 330-31. We therefore affirm the decision of Court of Federal Claims.

Each party shall bear its own costs.
99-5131

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 97-829T

Filed: June 21, 1999

* * * * * * * * * * * * * * * * * *

FRED D. COOK, JR. AND JANE A. COOK, Plaintiffs	* * *

as the Technology Products Mid-Hudson Valley Transition Program. She filed suit to have the sum payment she received as part of the program excluded from gross income for tax purposes as a settlement under Internal Revenue Code section 104(a)(2).

BACKGROUND

Plaintiff Jane A. Cook[1] was an employee of IBM. While there, she reported a back injury, torn ligaments and cartilage damage to her right knee, and sensitivity to oil-based paint fumes that caused nausea and headaches. Plaintiff did not file worker's compensation claims for any of these injuries or illnesses. IBM continued to pay plaintiff's salary while she was recovering, took actions to minimize her discomfort while at work, and paid her medical claims and insurance premiums. Plaintiff agrees that she was treated fairly.

IBM announced that it was "downsizing," and that plaintiff's position had been designated "surplus." Plaintiff was informed that her position would be terminated, but that she was eligible for the Technology Products Mid-Hudson

---

Plaintiff Fred D. Cook, Jr. is included in the complaint because he and Mrs. Cook filed a joint tax return. Reference to plaintiff in this opinion refers to Jane A. Cook.

Vailey Transition Program. IBM stated that the primary purposes of the program was to "help the Technology Products become more competitive by reducing its work force while retaining essential skills, and to ease the transition of employees choosing to participate in the program into a new career or retirement."

Participants in the plan would receive lump sum payments based on length of employment. In addition, they would be considered to be on a leave of absence for purposes of computing retirement income upon reaching retirement age. Participants agreed to retire at the end of the leave of absence and to sign a form entitled General Release and Covenant Not to Sue.

The General Release and Covenant Not to Sue begins with a paragraph inviting participants to discuss the form with management or with an attorney. The agreement states that participants waive all existing known or unknown claims against IBM whether based on theories of contract or of tort. The agreement also permitted participants to revoke within seven days of signing. Participants who revoked the agreement would be deemed to have voluntarily resigned, and the would not be eligible for the lump sum payment.

Plaintiff elected to participate in the plan.

She signed the General Release and Covenant Not to Sue. IBM informed her that her gross lump sum payment would be $37,790.20 and that her net payment after taxes would be $24,176.28. She received a check for that amount and a W2 form. When she filed her taxes, plaintiff included these amounts as gross income. She then filed a corrected tax return, claiming that the $37,790.20 included as gross income was settlement of a personal injury claim. The exclusion was denied.

DISCUSSION

For a payment to be excluded from income under I.R.C. section 104(a)(2), it must meet two requirements: (1) the cause of action for payment must be "based upon tort or tort type rights," and (2) money received must have been "on account of personal injuries or sickness." Commissioner of Internal Revenue v. Schleier, 515 U.S.323. 333-4 (1995). When there is not an express personal injury settlement agreement, the most important factor in determining whether the payment was made on account of personal injury is the intent of the payor. Ray v. United States, 25 Cl. Ct. 535, 540 (1990) (citation omitted), aff'd, 989 F. 2d 1204(Fed. Cir. 1993) (unpublished table decision). If the agreement does not mention personal injury claims, then the presumption is that the payment was not a personal injury claim settlement. Pipitone v. United States, 17 F. Supp. @d. 793, 797 (N.D. Ill. 1998) aff'd, 1999 WL

384164 (7th Cir., June 14, 1999).

IBM did not intend for the lump sum payment to be settlement of a personal injury claim. It informed employees that payments were made because of corporate downsizing. An IBM human resources executive declared that the payments were made because of downsizing and not as settlement of personal injury claims. Plaintiff had no suits or claims existing at the time that the agreement was executed. She had not threatened to initiate proceedings. Payment was based solely on length of employment and not upon any tort theory of recovery. The agreement was a standard boiler plate form that all participants in the plan signed. That variation was the individual participant's name typed on the form.

Plaintiff provides no evidence that her payment was made as settlement of a personal injury claim. She has no evidence that this agreement was specific to her. She agrees that IBM did not tell her that the lump sum payment was offered in settlement of a personal injury claim. She did not negotiate the terms of the payment as would be expected in a tort settlement.

CONCLUSION

Plaintiff has not raised a genuine issue of

material fact. We must grant defendant's motion for summary judgment. The Clerk will dismiss the plaintiff's complaint and enter judgement for the defendant. No costs.

s/ Robert H. Hodges, Jr.
Judge

APPENDIX C

Internal Revenue Service Department of the Treasury

Date: May 8, 1997

Kind of Tax: Income Tax
Tax periods Ended: December 31, 1993
Amount Claimed: $10,675.-
Person to Contact: F. Vulcan
Contact Telephone Number: (212) 264-7479

Fred D. Cook Jr. and Jane A. Cook
Box 222 Route 94
Washingtonville, NY 10992

CERTIFIED MAIL #2930865

Dear Mr. And Mrs. Cook:

We are sorry, but we cannot allow the above claim for an adjustment to your tax, for the reasons stated below. Our decision is based on provisions of the internal revenue laws and regulations. This letter is your legal notice that your claim is fully disallowed.

If you wish to bring suit or proceedings for the recovery of any tax, penalties or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or with

the United States Court of Claims. The law permits you to do this within 2 years from the mailing date of this letter.

If you have any questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,
s/unreadable
Associate Chief
Appeals Office

Reasons for disallowance

The funds, which you received under the settlement you signed, do not constitute IRC section 104 Compensation for Injuries or Sickness. They are deemed to be Gross Income as generally defined under IRC section 61(a).

Manhattan Appeals Office
90 Church Street
New York, New York 10007

Letter 1364(RO)
(Rev. 5-81)

APPENDIX D

GENERAL RELEASE AND COVENANT NOT TO SUE

- - - - - - - - - - -

IBM ADVISES YOU TO CONSULT AN ATTORNEY BEFORE YOU SIGN THIS RELEASE

If you feel that you are being coerced to sign this release or that your signing would for any reason not be voluntary, or you believe the process by which you have been offered this release or the payment in exchange for this release is discriminatory,[1] you are encouraged to discuss this with your management, TP MHVTP Project Office or Personnel before signing this release. After reviewing the release with your attorney, you can discuss concerns you have with your manager or your attorney can contact legal counsel at your location. You should thoroughly review and understand the effects of the release before

---

1 The Age Discrimination in Employment Act prohibits Employment discrimination based on age and is enforced by the Equal Employment Opportunity Commission (EEOC). Other federal laws prohibit discrimination in employment based on sex, race, color, national origin, religion, handicap, or veteran status. These laws are enforced by the EEOC and the U.S. Department of Labor. There are also state and local laws prohibiting discrimination, which are enforced by state and local human rights agencies.

signing it.

In exchange for the sums and benefits which you will receive pursuant to the terms of the Technology Products Mid-Hudson Valley Transition Program (TP MHVTP), **Jane A. Cook**, (hereinafter "you") agrees to release International Business Machines Corporation (hereinafter "IBM") and its benefits plans from all claims, demands, actions or liabilities you may have against IBM of whatever kind, including but not limited to those which are related to your employment with IBM, the termination of that employment or other severance payments or your eligibility or participation in the Retirement Bridge Leave of Absence. You agree that this also releases from liability IBM's agents, directors, officers, employees, representatives, successors and assigns (hereafter "those associated with IBM"). You agree that you have voluntarily executed this release on your own behalf, and also on behalf of any heirs, agents, representatives, successors and assigns that you may have now or in the future. You also agree that this release covers, but is not limited to, claims arising from the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act of 1964, as amended, and any other federal, state or local discrimination based on sex, race, national origin, religion, disability, veteran status or age. You also agree that this

release includes claims based on theories of contract or tort, whether based on common law or otherwise. This agreement covers both claims that you know about and those that you may not know about which have accrued by the time you execute this release. This release does not include your nonforfeitable rights to your accrued benefits (within the meaning of Sections 203 and 204 of the Employee Retirement Income Security Act of 1974, as amended). As of the date of your retirement from IBM under the IBM Retirement Plan and the IBM Tax Deferred Savings Plan, which are not released hereby but survive unaffected by this document.

TP MHVTP/SUE

IBM CONFIDENTIAL Page 2 of 3

You agree that you will never institute a claim of any kind against IBM, or those associated with IBM, including but not limited to claims related to your employment with IBM or the termination of that employment or severance payments or your eligibility or participation in the Retirement Bridge Leave of Absence. If you violate this release by suing IBM or those associated with IBM, you agree that you will pay all costs and expenses of defending against the suit incurred by IBM or those associated with IBM, including reasonable attorneys' fees.

APPENDIX D

You acknowledge and agree that:

1. The payment and benefits provided pursuant to the TP MHVTP constitute consideration for this release, in that they are payments and benefits to which you would not have been entitled had you not signed this release.

2. You have been given the opportunity to take a period of at least forty-five (45) days within which to consider this release and to review: (a) the terms of the TP MHVTP, (b) a list of the job titles and ages of employees in your job classification or organization unit, if any, who were not eligible to participate in the TP MHVTP.

3. This release does not waive any claims that you may have which arise after the date you sign this release.

4. You have not relied on any representations, promises, or agreements of any kind made to you in connection with your decision to accept the TP MHVTP except for those set forth in the TP MHVTP Summary Plan Description and other official plan documentation.

5. In the event of rehire by IBM or any of its subsidiaries as a regular employee, you understand that IBM reserves the right to require

repayment of a prorated portion of the TP MHVTP payment. The amount of repayment will be calculated as one week of pay at the rate used to calculate the TP MHVTP payment, multiplied by the difference between the number of weeks used to calculate the TP MHVTP payment and the number of weeks away from IBM, less associated payroll taxes withheld by IBM.

This release is not effective or enforceable for seven days after you sign it and you may revoke it during that time. To revoke, you agree to deliver the gross TP MHVTP payment less associated payroll taxes withheld by IBM, and a written notice of revocation to your manager or the personnel manager responsible for your location. This must be done prior to the conclusion of the seventh day after you sign the release. If your manager, or the personnel manager, does not receive a written revocation and the sum stated above by the end of the seven day period, this release will become fully enforceable at that time. Revocation of this release does not alter or change your choice to leave IBM.

TP MHVTP/SUE/2

In case any part of this Agreement shall be

invalid, illegal or otherwise unenforceable, the validity, legality and unenforceable of the remaining provisions shall not in any way be affected or impaired thereby.

You understand and agree to this General Release and Covenant Not to Sue.

Jane A. Cook
Name (print)

s/ Jane A. Cook 04/28/93
Signature

Janet F. Hrebin
witness (print name)

s/Janet F. Hrebin
witness (signature)

4/28/ 93
Date

TP MHVTP/SUE/3

APPENDIX E

GENERAL RELEASE AND COVENANT NOT TO SUE

- - - - - - - - - - -

IBM ADVISES YOU TO CONSULT AN ATTORNEY BEFORE YOU SIGN THIS RELEASE

If you feel that you are being coerced to sign this release or that your signing would for any reason not be voluntary, or you believe the process by which you have been offered this release or the payment in exchange for this release is discriminatory,[1] you are encouraged to discuss this with you management, TP MHVTP Project Office or Personnel before signing this release. After reviewing the release with your attorney, you can discuss concerns you have with your manager or your attorney can contact legal counsel at your location. You should thoroughly review and understand the effects of the release before signing it.

Page 1 of 8
(Renumber as Appropriate)

---

1 The Age Discrimination in Employment Act prohibits employment discrimination based on age and is enforced by the Equal Employment Opportunity Commission (EEOC). Other federal laws prohibit discrimination in employment based on sex, race, color, national origin, religion, disability, or veteran status. These laws are enforced by the EEOC and the U. S. Department of Labor. There are also state and local laws prohibiting discrimination, which are enforced by state and local human rights agencies.

APPENDIX E

In exchange for the sums and benefits which you will receive pursuant to the terms of the Technology Products Mid-Hudson Valley Transition Program (TP MHVTP), (Name of Individual)(hereinafter "you") agrees to release International Business Machines Corporation (hereinafter "IBM") and its benefits plans from all claims, demands, actions or liabilities you may have against IBM of whatever kind, including but not limited to those which are related to your employment with IBM, the termination of that employment or other severance payments or your eligibility or participation in the Retirement Bridge Leave of Absence. You agree that this also releases from liability IBM's agents, directors, officers, employees, representatives, successors and assigns (hereafter "those associated with IBM"). You agree that you have voluntarily executed this release on your own behalf, and also on behalf of any heirs, agents, representatives, successors and assigns that you may have now or in the future. You also agree that this release covers, but is not limited to, claims arising from the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act of 1964, as amended, and any other federal, state or local discrimination based on sex, race, national origin, religion, disability, veteran status or age. You also agree that this release includes claims based

on theories of contract or tort, whether based on common law or otherwise. This agreement covers both claims that you know about and those that you may not know about which have accrued by the time you execute this release. (See end note 1 for California.) This release does not include your nonforfeitable rights to your accrued benefits (within the meaning of Sections 203 and 204 of the Employee Retirement Income Security Act of 1974, as amended). As of the date of your retirement from IBM under the IBM Retirement Plan and the IBM Tax Deferred Savings Plan, which are not released hereby but survive unaffected by this document.

You agree that you will never institute a claim of any kind against IBM, or those associated with IBM, including but not limited to claims related to your employment with IBM or the termination of that employment or severance payments or your eligibility or participation in the Retirement Bridge Leave of Absence. If you violate this release by suing IBM or those associated with IBM, you agree that you will pay all costs and expenses of defending against the suit incurred by IBM or those associated with IBM, including reasonable attorneys' fees.

APPENDIX E

(Page 3 of 8)
Renumber as Appropriate)

You acknowledge and agree that:

1. The payment and benefits provided pursuant to the TP MHVTP constitute consideration for this release, in that they are payments and benefits to which you would not have been entitled had you not signed this release.

2. You have been given the opportunity to take a period of at least forty-five (45) days within which to consider this release and to review: (a) the terms of the TP MHVTP, (b) a list of the job titles and ages of employees in your job classification or organization unit, if any, who were not eligible to participate in the TP MHVTP.

3. This release does not waive any claims that you may have which arise after the date you sign this release.

(Page 4 of 8)
(Renumber as Appropriate)

4. You have not relied on any representations, promises, or agreements of any kind made to you in connection with your decision to accept the TP MHVTP except for those

set forth in the TP MHVTP Summary Plan Description and other official plan documentation.

5. In the event of rehire by IBM or any of its subsidiaries as a regular employee, you understand that IBM reserves the right to require repayment of a prorated portion of the TP MHVTP payment. The amount of repayment will be calculated as one week of pay at the rate used to calculate the TP MHVTP payment, multiplied by the difference between the number of weeks used to calculate the TP MHVTP payment and the number of weeks away from IBM, less associated payroll taxes withheld by IBM.

This release is not effective or enforceable for seven days after you sign it and you may revoke it during that time. To revoke, you agree to deliver the gross TP MHVTP payment less associated payroll taxes withheld by IBM, and a written notice of revocation to your manager or the personnel manager responsible for your location. This must be done prior to the conclusion of the seventh day after you sign the release. If your manager, or the personnel manager, does not receive a written revocation and the sum stated.

(Page 5 of 8)
(Renumber as Appropriate)

above by the end of the seven day period, this

release will become fully enforceable at that time. Revocation of this release does not alter or change your choice to leave IBM.

In case any part of this Agreement shall be invalid, illegal or otherwise unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

You understand and agree to this General Release and Covenant Not to Sue.

_____

Name (print)

_____

Signature

_____

witness (print name)

_____

witness (signature)

_____

Date

APPENDIX E

End Note 1: Employees in California will have the following paragraph added as the next numbered paragraph:

6. Section 1542 of the California Civil Code states:

> A general release does not extend to claims which a creditor does not know or suspects to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

> Since you intend to release IBM an those associated with IBM of all claims, you agree to waive your rights, to the extent permitted by law, under section 1542. In the event that you do not understand Section 1542 or its legal effect on you, you are advised to seek legal counsel.

End Note 2: Employees who are asked to execute a Covenant not to Compete will have the following paragraph added as the next numbered paragraph in this release.

> For a period equal to the number of weeks used to calculate your TP MHVTP payment, you will not, without first notifying IBM and

obtaining its approval, engage in any activity with or organization which competes with or which is prejudicial to or is in conflict with the interests of IBM or its Subsidiaries. To ensure compliance with this provision, you agree to notify IBM of any prospective employment you intend to accept during this period.

California employees asked to execute a covenant not to compete will have the following paragraph added in lieu of the paragraph above:

You acknowledge your obligations to IBM regarding IBM's intellectual property, and further acknowledge that these obligations continue after your employment with IBM terminates. In addition to all other obligations that you have to avoid misuse of IBM's intellectual property, you agree that a period equal to the number of weeks used to calculate your TP MHVTP payment, you will not engage on any activity or accept any employment without obtaining IBM's agreement that your specific assignment will not require you to use or disclose IBM's Confidential Information. IBM will not unreasonably withhold its agreement. To insure

Supreme Court
FILED
APR 26 2001
CLERK

(2)

No. 00-1382

In the Supreme Court of the United States

FRED D. COOK, JR. AND JANE A. COOK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

CLAIRE FALLON
Acting Assistant Attorney General

KENNETH L. GREENE
DONALD B. TOBIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

11pt

QUESTION PRESENTED

Whether a payment received by petitioner as part of a downsizing program is excludable from income under Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. 104(a)(2), as damages received on account of personal injuries or sickness.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Abbott v. *United States*, 231 F.3d 889 (2d Cir. 2000), cert. denied, No. 00-1065 (Apr. 2, 2001)	5
Abrahamsen v. *United States*, 228 F.3d 1360 (Fed. Cir. 2000), cert. denied, No. 00-1066 (Apr. 2, 2001)	5
Commissioner v. *Schleier*, 515 U.S. 323 (1995)	5
Gajda v. *Commissioner*, 158 F.3d 802 (5th Cir. 1998)	5-6
Lubart v. *Commissioner*, 154 F.3d 539 (5th Cir. 1998)	6
Pipitone v. *United States*, 180 F.3d 859 (7th Cir. 1999)	7
Rogers v. *Lodge*, 458 U.S. 613 (1982)	7
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	7

Statutes:

Internal Revenue Code, 26 U.S.C. 104(a)(2)	4, 5
Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605(a), 110 Stat. 1838	5

In the Supreme Court of the United States

No. 00-1382

FRED D. COOK, JR. AND JANE A. COOK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a), is unpublished, but the decision is noted at 243 F.3d 561 (Table). The opinion of the Court of Federal Claims (Pet. App. 1b-6b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2000. The petition for rehearing was denied on November 15, 2000. Pet. App. 2a. The petition for a writ of certiorari was filed on February 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Jane A. Cook was employed by IBM from 1968 through 1970 and from 1978 through 1993.[1] In 1993, she left her employment with IBM as part of a downsizing program adopted by that company to help its technology products division become more competitive. Pet. App. 3b. Pursuant to this program, IBM paid a lump-sum to each participant based on the employee's years of service and salary at the time of termination. *Id.* at 5a, 3b. Participants were granted a "retirement bridge leave of absence," which allowed them to take leave until they became eligible for retirement. *Id.* at 3b, 2d. IBM withheld income and employment taxes from all payments made under its downsizing program. The company's representative testified that these payments were made to facilitate the downsizing program and not as a settlement of personal injury claims. *Id.* at 5b.

When petitioner participated in the downsizing program in 1993, she took a pre-retirement leave of absence and received a lump-sump payment of $37,790. The amount of this payment was based wholly upon her salary and years of service. Pet. App. 5a, 3b. As a condition of participation in the downsizing program, employees were required to resign or take a bridge leave of absence and to sign a general waiver of any and all claims against IBM. *Id.* at 3b. The release was a standard form. It was not negotiated with, or tailored to the particular circumstances of, any individual participant. *Id.* at 5b. Under the form release, each participant released IBM from all claims arising from the Age

---

[1] Petitioner Fred D. Cook is a party to this action solely because he filed a joint return with Jane Cook. Pet. App. 2b. References to petitioner in this brief are to Jane Cook.

Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act of 1964, as amended, and any other federal, state or local law dealing with discrimination in employment, and for all "claims based on theories of contract or tort, whether based on common law or otherwise." *Id.* at 2d.

As part of the termination agreement, petitioner stipulated that, if she returned to work at IBM, the company would be entitled to repayment of a prorated portion of the lump-sum termination payment. Pet. App. 4d. The program agreement also specified that IBM would withhold appropriate payroll taxes from this payment. *Id.* at 5d.

2. Several years before petitioner left her employment at IBM, she had reported several work-related injuries. From separate incidents, she reported a back injury, torn ligaments and cartilage damage to her right knee, and sensitivity to oil-based paint fumes that caused nausea and headaches. Pet. App. 2b. Petitioner did not file a worker's compensation claim with respect to any injuries or illnesses she suffered while working at IBM. Instead, IBM paid her salary during her recovery periods at home, took actions to alleviate or minimize the amount of discomfort she experienced while at work, and paid for all of her medical claims and medical insurance premiums. *Ibid.*

Petitioner acknowledged that, as of the time she signed the release, she had not asserted or threatened any claims against IBM for personal injury or for physical or emotional harm. C.A. App. 20-22. She further stipulated that neither her manager at IBM nor any other IBM official ever stated to her that the lump-sum payment she received was in settlement of any type of claim for personal injury against that company. *Id.* at 24.

3. Petitioner filed a timely federal income tax return for 1993 and paid the taxes due. She thereafter filed a claim for refund of the income taxes withheld from her lump-sum payment from IBM. She contended that this payment was received in settlement of claims for personal injuries based upon tort and tort-type rights and was therefore excluded from income under Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. 104(a)(2). When the Internal Revenue Service denied the refund claim, petitioner commenced this refund action in the Court of Federal Claims.

4. The Court of Federal Claims granted the government's motion for summary judgment. Pet. App. 1b-6b. The court concluded that "IBM did not intend for the lump sum payment to be settlement of a personal injury claim" and that the "payments were made because of corporate downsizing" and "not as settlement of personal injury claims." *Id.* at 5b. The court noted that petitioner had no pending suits or claims against IBM and had not threatened to file any such suits or claims. *Ibid.* The court found that the form release signed by petitioner was a general release signed by all participants and that the lump-sum payment was based solely on length of employment and not upon any tort theory of recovery. *Ibid.* The court pointed out that there was simply no evidence that the payment was made as a settlement of a personal injury claim. *Ibid.* The court observed that petitioner "agrees that IBM did not tell her that the lump sum payment was offered in settlement of a personal injury claim" and that she "did not negotiate the terms of the payment as would be expected in a tort settlement." *Ibid.*

5. The court of appeals affirmed. Pet. App. 3a-5a. The court held that petitioner's lump-sum payment was not received "on account of personal injuries or sick-

ness" and was therefore not excludable from income under Section 104(a)(2) of the Code. *Id.* at 5a. The court noted that the payment was based solely on petitioner's salary and length of service with IBM and was not designed to compensate her for any specific injuries. *Ibid.* The court held that the amount she received was "completely independent of the existence or extent of any personal injury." *Ibid.* (quoting *Commissioner* v. *Schleier*, 515 U.S. 323, 330 (1995)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The courts below correctly held that the lump-sum payment that petitioner received from IBM was not excludable from income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness." 26 U.S.C. 104(a)(2).[2] The same question presented in this case was raised, and resolved adversely to the taxpayer, in other cases involving the IBM downsizing program in which this Court recently denied petitions for a writ of certiorari. *Abbott* v. *United States*, 231 F.3d 889 (2d Cir. 2000), cert. denied, No. 00-1065 (Apr. 2, 2001); *Abrahamsen* v. *United States*, 228 F.3d 1360 (Fed Cir. 2000), cert. denied, No. 00-1066 (Apr. 2, 2001). Accord, *Gajda* v. *Commissioner*, 158 F.3d 802 (5th Cir.

---

[2] In the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605(a), 110 Stat. 1838, Congress amended Section 104(a)(2) to exclude from gross income only damages paid on account of "physical" injuries and sickness. This amendment does not apply to this case because the releases were signed prior to the effective date of the Act. See 110 Stat. 1838.

1998); *Lubart* v. *Commissioner*, 154 F.3d 539 (5th Cir. 1998). For the same reasons stated in our brief in opposition to the petitions for certiorari that the Court recently denied, the petition for a writ of certiorari should be denied in this case as well.[3]

2. Petitioner stipulated that as of the time she signed the release, she had not asserted or threatened any claims against IBM for personal injury, including any physical or emotional harm. C.A. App. 20-22. She further stipulated that neither her manager nor any other IBM official ever stated to her that the lump-sum payment in issue was made in settlement of a tort-type or any other claim for personal injury against IBM. *Id.* at 24. The release signed by petitioner was a standard form release that did not reflect a negotiated compromise of any actual claims. Everyone who participated in the program received a lump-sum payment calculated in exactly the same way. The amount of the payment was based on salary and length of service, and was not calculated based on the value of any particular claim or injury alleged to have been sustained. The release signed by petitioner was not negotiated by IBM and petitioner in the context of a pending claim or lawsuit, but was instead imposed in the context of a corporate downsizing effort. The release was drafted by IBM and was not tailored to any individual's particular circumstances. In short, the downsizing payments were not made to petitioner on account of any personal injury, and the payment compensated petitioner only for an economic loss, not personal damages.

---

[3] We are providing herewith to petitioner a copy of the government's brief in opposition to the petitions in Nos. 00-1065 and 00-1066.

Petitioner nonetheless claims (Pet. 9-10) that her case is distinguishable from the other IBM downsizing cases because she actually suffered injuries during the years of her employment. But the injuries that she describes (see page 3, *supra*) were irrelevant both to the decision to make, and to the calculation of, the lump-sum payments under the downsizing program. As the courts below correctly concluded, the record of this case amply demonstrates that the payment she received was not made as compensation for any personal injury she may have suffered. Pet. App. 5a, 5b. That factual determination, which was "concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)), does not warrant review by this Court. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).[4]

---

[4] Petitioner errs in asserting (Pet. 5) that the decision in this case conflicts with *Pipitone* v. *United States*, 180 F.3d 859 (7th Cir. 1999). The decision in *Pipitone* in fact supports the decision in this case. *Pipitone* involved a plaintiff who received a severance payment from his company. The plaintiff argued that the payment was compensation for his release of any claims he might have for age discrimination and other tort claims. *Id.* at 861. The court concluded, however, that the severance payment was not made to compensate the plaintiff for those claims but was instead made to compensate the plaintiff for the termination of his employment. Because the employment termination did not itself cause a personal injury, the court held that the severance payment was not excluded from income under Section 104(a)(2). 180 F.3d at 864.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

CLAIRE FALLON
Acting Assistant Attorney General

KENNETH L. GREENE
DONALD B. TOBIN
Attorneys

APRIL 2001

(3)

No. 00-1382

Supreme Court, U.S.
FILED
MAY 4 2001
OFFICE OF THE CLERK

In The Supreme Court of the United States

FRED D. COOK, JR. and JANE A. COOK,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals Federal Circuit

REPLY TO BRIEF IN OPPOSITION

JANE A. COOK
Pro Se
P.O. Box 222
2728 Route 94 West
Washingtonville, N.Y. 10992
(845) 496-9472

9 pp

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	6

TABLE OF AUTHORITIES

Cases:	Page
Commissioner v. Schleier, 515 U.S. 323(1995)	1,5,6
Hamm v. Commissioner, 74 T.C.M. (CCH) 279(1997)	7
Keel v. Commissioner, 73 T.C.M. (CCH) 3092(1997)	3
Pipitone v. United States, 180 F. 3d 859(7th Cir. (1999)	2,3

ARGUMENT

The Federal Circuit has decided a recurring issue of tax law that conflicts with the applicable decision of this Court of *Commissioner v. Schleier,* 515 U.S. 323 (1995) and with the reasoning of the 7th Circuit of *Pipitone v. United States,* 180 F. 3d 859 (7th Cir. 1999).

1. It is ironic that the facts of Petitioners' case are the exact opposites of the facts of cases cited by Respondent,[1] yet the lower courts ignore the facts of Petitioners' case and rule in favor of the government, denying Petitioners' claim for a tax refund.

The pertinent differences between the facts of Petitioners' case and the cited cases are:

a) Petitioner[2] had tort type causes of action which had accrued during her IBM employment, prior to the signing of her Covenant Not to Sue.

Because Petitioner had not assertively pursued these tort type claims, does not nullify their existence (Resp. Br. @ p. 3, pt. 2). The courts have opined that claims do not have to be formerly or assertively filed to establish the existence of an underlying tort type cause of

---

1 *Abbott v. U.S.,* 231 F. 3d 889 2d Cir. 2000; *Abrahamsen v U.S.,* 228 F. 3d 1360 (Fed. Cir. 2000); *Gajda v. Commissioner,* 158 F. 3d 802 (5th Cir. 1998); *Lubert v. Commissioner,* 154 F. 3d 539 (5th Cir 1998).

2 Petitioner in the singular shall refer to the wife.

action.[3]

In the cited cases, of Respondent, plaintiffs had no record of tort type claims.

b) Petitioner has suffered permanent personal injuries and chronic sickness, as a direct result of her employment with IBM.

Again, in the aforementioned cited cases of Respondent, plaintiffs had no existing personal injuries or sicknesses prior to signing their Covenant Not to Sue.

Clearly IBM was offering the payment in exchange for Petitioner releasing IBM from all liability of her tort type claims and obtaining her agreement not to sue IBM for damages on account of her personal injuries and chronic sickness related to those claims. The intent of the program and the purpose of the General Release and Covenant Not to Sue are clearly stated in the the TP MHVTP Summary Plan Description. The influential factor as to what was the intent of the payment, was determined by Petitioner's personal employment circumstances.

c) IBM paid specific attention to the injuries of Petitioner (Resp. Br. @ p. 7), as her IBM medical charts were specifically reviewed for the program. If IBM had no intention of considering Petitioner's personal injuries and chronic sickness, what was the relevance of reviewing her IBM medical history charts?

The fact that her medical charts were reviewed

---

3 *Ham v. Commissioner*, [Dec. 52, 189] 74 T.C.M., CCH 358, 282 (1999); *Pipitone v U.S.*, 1996 WL384164, *4 (7th Cir. (Ill))

for the TP MHVTP project office, substantiates Petitioners' claim that IBM was aware of her tort type cause of action and the resulting injuries and sickness. IBM's knowledge of the claims and resulting injuries and sickness has a positive impact in determining that the requisite intent of IBM's was for Petitioner's payment to be a settlement for damages on account of personal injuries and sickness, on the condition she would agree not to sue IBM. *Pipitone v. United. States.*, *1999* WL 384164, *4 (7th Cir. (Ill.)); citing *Keel v. Commissioner*, 73 T.C.M. (CCH) 3095 (1999)

In the circumstances surrounding plaintiffs of Respondent's cited cases, the employers had no knowledge of plaintiffs' claims of personal injury or sickness resulting from their employment.

2. Based on the facts of Petitioners' case, Respondent errs, in asserting that the decision in *Pipitone v. U.S.*, supra, supports the decision of the court of appeals of Petitioners' case (Resp. Br. [FN 4]).

a) Petitioner's payment was not severance pay as the payment was in Pipitone, because her employment was not terminated at the time of her signing the General Release and Covenant Not to Sue. Petitioner was still considered to be an employee of IBM for an additional five years, after signing the Covenant.

b) Based on Petitioner's tort type cause of action, Petitioners' argued, that the payment, received from IBM, was for damages on account of personal injuries and sickness, in exchange, for releasing IBM from any liability

of Petitioner's tort type claims and agreeing not to sue IBM for these personal injuries and sickness based on those claims.

In Pipitone, no recorded tort type claims existed. Hence, the facts of Petitioners' case are the opposites of those facts of Pipitone. It would thus follow, that based on the facts of Petitioners' case, there is a conflict in the reasoning Of the Federal Circuit of Petitioners' case v. the reasoning of the 7th Circuit, based on the facts of the Pipitone case. This would logically dictate that the decisions of the two cases should not be the same. There in lies the conflict.

3. The fact that Petitioners stipulated that neither Petitioner's manager nor any IBM official (including CEO or any other executive officer) ever stated to Petitioner that her payment was made in settlement of tort type claims on account of personal injury or sickness, is irrelevant. No manager or IBM official ever said the payment wasn't for such claims (Resp. Br. @ p. 2).

Regardless, Petitioner was restricted by her Covenant, not to rely "on any representations, promises, or agreements of any kind made to [her] in connection with [her] decision to accept the TP MHVTP except those set forth in the TP MHVTP Summary Plan Description and other official plan documentation." (Pet. App. @ pt. 4, p. 4d)

Therefore whatever statements managers or IBM officials made outside the context of the TP MHVTP Summary Plan Description and official plan documentation, were not to be considered by Petitioner. Likewise, the lower courts should not

have considered such statements, of an IBM executive, that were contradictory to what was written within that documentation. His statements should not nullify what was clearly written within the TP MHVTP Summary Plan Description and official plan documentation.

Agreements are supposed to eliminate such after the fact misleading statements, such as those that were made by the IBM executive.

It is not standard practice to validate contradictory statements made by individuals about an agreement and ignore the text of that agreement. However, this is exactly what the lower courts had to do, in order to arrive at a decision of Petitioners' case, that would be consistent with the decisions of the other IBM Individual Transition Option (ITO) cases, even though the facts of Petitioners' case were the opposites of the facts of the other IBM ITO cases cited by Respondent.

4. The decision of the court of appeals conflicts with the decision of this Court of *Commissioner v. Schleier*, supra, as Petitioner had tort like claims and resulting personal injuries and chronic sickness. One of IBM's intents was for the payment to be the settlement of such tort type claims (Pet. App. @ p. 3d). The payment received by Petitioner from IBM was damages received by agreement, on account of her personal injuries and her chronic sickness. She agreed that in exchange for the sum of her payment, she would "never institute a claim of any kind against IBM, or those associated with IBM, including but not limited to

claims related to [her] employment", as stated in her personalized General Release and Covenant Not to Sue.

The facts of Petitioners' case meet the two pronged requirements of *Commissioner v. Schleier,* supra.

CONCLUSION

For the reasons set forth in this Reply and Petitioners' Writ of Certiorari, Petitioners request that their Petition for a Writ of Certiorari be granted.

Respectfully submitted,

Jane A. Cook
Pro Se
P.O. Box 222
2728 Route 94W
Washingtonville, NY 10992
(845) 496-9472

May 2000